IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1238

CROATAN BOOKS, INC.,

Petitioner,

-vs-

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

CROATAN BOOKS, INC., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in the above-entitled cases on November 13, 1978.

OPINIONS BELOW

The refusal of the petition for appeal by the Supreme Court of the Commonwealth of Virginia is unreported and is printed in Appendix A hereto, *infra*, page 1a. The entry of Judgment by the Circuit Court for Fairfax County, Virginia is unreported.

JURISDICTION

The Judgment of the Supreme Court of Virginia (appendix A, *infra*, page 1a) was entered on November 13, 1978. The jurisdiction of this Court is invoked under Title 28 Section 1257(3) of the United States Code.

QUESTIONS PRESENTED

1. Whether the Petitioner was denied its right to a fair trial and its right to due process of law guaranteed by the Fifth Amendment and the Fourteenth Amendment to the United States Constitution when the trial Court refused to allow counsel for the Petitioner to voir dire the jury with questions designed to show any prejudice against the Petitioner and the jurors' state of mind.

2. In an obscenity prosecution, whether the Petitioner was denied its First Amendment right to freedom of speech and its Fourteenth Amendment right to due process of law when the trial court refused to instruct the jury on the relevant size of the community to be considered in determining community standards of tolerance/acceptance in an obscenity prosecution.

3. Whether the refusal to allow the Petitioner's expert witness to testify regarding community standards infringed upon Petitioner's First Amendment rights and denied Petitioner's right to a fair trial and due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

4. Whether the Petitioner's right to due process of law under the Fourteenth Amendment and to effective assistance of counsel under the Sixth Amendment and freedom of speech under the First Amendment, were denied when the trial court refused to allow counsel for Petitioner to argue to the jury about comparable literary materials available in the community, in an obscenity prosecution.

5. Whether the trial Court's refusal to instruct the jury on the definition of "prurient" and on the appeal of alleged obscene items to the intended or probable recipient group, infringed Petitioner's right of freedom of speech provided by the First Amendment and denied the Petitioner's right to due process of law and a fair trial, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America and the Code of the State of Virginia, Section 18.2 - 374(4).

STATEMENT OF THE CASE

Petitioner was tried by a jury in the Circuit Court for Fairfax County, Virginia, in Criminal Case Numbers 25601, 25602, 25603, 25607, which were consolidated for trial. The Petitioner was charged with four misdemeanor counts of possession with intent to rent an obscene film. On

Voir Dire the Court curtailed efforts of Petitioner's counsel to interrogate the prospective jurors regarding their possible prejudice to adult bookstores, and the Petitioner. The four coin operated mechanical motion picture projectors, with the films and coin boxes, were introduced at trial, and the films were shown to the jury. The Commonwealth produced as a witness a citizen living in the vicinity of Petitioner's adult bookstore, who testified concerning the contemporary community standards of tolerance of sexually explicit motion pictures in that area.

At the close of the Commonwealth's case, Petitioner moved the Court to strike the evidence and enter a judgment of acquittal on the grounds that the alleged obscene films were protected by the First Amendment to the United States Constitution. The motion was denied (tr. 73-75).

The Petitioner introduced as a witness an expert in human sexuality, Doctor Lawrence Donner, who testified that the four motion pictures do not appeal to a prurient interest. Dr. Donner was not permitted to voice his opinion regarding contemporary community standards in Fairfax County, Virginia (tr. 96).

At the close of all the testimony, the trial Court denied the Petitioner's request for instructions that the relevant community for determining contemporary community standards of tolerance and/or acceptance of sexually explicit material in motion pictures should be nothing less than Fairfax County as a whole, (tr. pgs. 119, 123-124), and denied Petitioner's instructions relating to the prurient effect of the material in Case number 25607, upon the probable homosexual audience for the movie "Super Stud", (tr. 122-123). The trial Court refused to instruct the jury that they should consider the entire County of Fairfax in

evaluating community standards, (tr. 119-121), and the trial Court refused to give instructions defining the word "prurient", (tr. 121), and regarding the prurient effect upon the probable intended recipient group, (tr. 122-123), and proposed instructions regarding prurient appeal to an adult, excluding minors.

During final argument to the jury, the trial Court refused to allow Petitioner's Counsel to argue that the jury could compare sexually explicit magazines, which they may be aware of, such as "Playboy", and "Hustler", in determining community standards of tolerance in explicit sexual materials (tr. 1610).

Upon the jury's verdict of guilt in each case, and assessment of a One Thousand Dollar ($1,000.00) fine in each case, the trial Court, having overruled the Petitioner's Motion to set aside the verdict and grant a new trial, on April 21, 1978, imposed the sentence. A Petition for Appeal was timely filed by the Petitioner, which was denied by the Supreme Court of Virginia on November 13, 1978.

REASONS FOR GRANTING THIS WRIT

1. The Circuit Court for Fairfax County, Virginia, erred in prohibiting the Petitioner's Counsel from asking questions on voir dire to determine if the prospective members of the jury bore any prejudice towards the Defendant, and the jurors ability to follow the law of the case as propounded to the jury by the Court.

Upon voir dire examination of the prospective jurors, the Petitioner proposed eight written questions which the trial Court considered prior to oral examination of the jurors by the Petitioner's Counsel. The trial Court excluded the questions relating to possible prejudice against

the Petitioner, because of the Petitioner's maintaining an adult bookstore business in Fairfax County. The Court also excluded interrogatories intending to probe into the state of mind of the prospective jurors, with a view toward determining whether the jurors would be capable of following the trial court's instructions, in this obscenity prosecution, without consideration of criticism, in the event of an acquittal, and without bias or prejudice because of the juror's personal dislike of the sexually explicit motion pictures involved. The trial Court's error in this regard infringed upon the Petitioner's right to freedom of speech provided by the First Amendment and has denied the Petitioner a fair trial and due process of law guaranteed to the Petitioner under the Fifth, and Fourteenth Amendments, to the Constitution of the United States of America, (tr. 16-19).

2. The Circuit Court for Fairfax County, Virginia, erred in denying the Petitioner's request to instruct the jury that the relevant community to be considered for determining contemporary standards of tolerance and/or acceptance of sexually explicit material in motion pictures, was nothing less than Fairfax County as a whole, in violation of Petitioner's First Amendment right to disseminate non-obscene information.

This identical issue was raised by the Petitioner in an appeal to the Supreme Court of Virginia from a conviction in the Circuit Court for Fairfax County, Virginia, and is included in a Petition for Writ of Certiorari to the Supreme Court of Virginia currently pending before this Court, Number 78-718.

The trial Court's instruction to the jury was subject to the interpretation that the relevant community was the immediate and local vicinity of the Petitioner's bookstore,

where the alleged obscene films were presented, (tr. 118-120). This ruling has been the subject of comment in three opinions of the Supreme Court of the United States, and at least one decision of the Supreme Court of the State of Virginia. In the case of *Hamling v. United States,* 418 US 87 (1974), 41 L.Ed.2d 590, a Federal prosecution in the State of California, which had a "state-wide" contemporary community standard statute, this Court held that it is not necessary to instruct upon a national community standard, but that *Miller v. California,* 413 US 15, required only a "contemporary community standard".

The case of *Jenkins v. Georgia,* 418 U.S. 153 (1974), 41 L.Ed.2d 642, held there was no constitutional requirement that juries be instructed in State obscenity cases, to apply the standards of a hypothetical State-wide community, asserting that *Miller v. California, supra,* approved but did not mandate, such an instruction, and that jurors may be properly instructed to apply "community standards" without a specification of the "community" by the trial Court.

In the case of *Smith DBA Intrigue v. United States,* 431 US 291, 52 L.Ed.2d 324, 334 (1977), another Federal prosecution, the Court, at footnote number 6, in reviewing this problem, stated "the Court has never varied from the Roth position that the community as a whole should be the judge of obscenity, and not a small, atypical subset of the community. The only exception to this rule that has been recognized is for material aimed at a clearly defined deviant sexual group."

This matter was the subject of an appeal to the Supreme Court of the State of Virginia in *Alexander v. Commonwealth,* 212 Va. 554, 186 S.E.2d 43, which involved the contemporary community standard for the

entire City of Portsmouth, Virginia, which was found to be constitutionally acceptable by the Supreme Court of Virginia in a civil, non-jury condemnation proceeding.

3. The trial Court erred in refusing to allow Dr. Lawrence Donner, an expert in human sexuality, to testify relating to the appeal to prurient interest of the material, applying the contemporary community standards of tolerance and/or acceptance of Fairfax County, Virginia.

Upon objection from the Commonwealth Attorney, Dr. Donner was not permitted to voice his opinion regarding community standards of acceptance and/or tolerance of sexually explicit material in Fairfax County, Virginia, (tr. 96). The Doctor had previously been qualified as an expert in human sexuality, (tr. 77-88), and testified relative to the three scientific methods of evaluating contemporary community standards. This error was magnified when the trial Court overruled the Petitioner's objection to the qualifications of the Commonwealth's alleged expert witness, Bradford Lampshire, allowing him to voice his opinion on that subject, (tr. 55), which was based upon his evaluation of the majority viewpoint voiced in discussions with approximately 100 people, most of whom were derived from his own neighborhood, (Tr. 52-54).

In the case of *Smith v. California*, 361 US 147, 4 L.Ed. 2d 205 at 217-218, Justice Frankfurter, in his concurring opinion, stated as follows:

> "The uncertainties pertaining to the scope of scienter requisite for an obscenity prosecution and the speculative proof that the issue is likely to entail, are considerations that reinforce the right of one charged with obscenity – a right implicit in the very nature of the legal concept

> of obscenity – to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. It is immaterial whether the basis of the exclusion of such testimony is irrelevance, or the incompetence of experts to testify to such matters. The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. The determination of obscenity no doubt rests with a judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device."

The alleged expert witness for the prosecution, Bradford Lampshire, was permitted to give testimony regarding all three prongs of the test for obscenity, (tr. 56-61), even though his opinion was based upon divergent views of the citizenry which he polled, and he utilized an inaccurate sampling of the citizenry, and he did not discuss homosexual materials as contained in case number 25607.

Petitioner recognizes that it is not incumbent upon the Commonwealth to produce expert testimony of obscenity, *Hamling v. United States*, 418 US 87, 41 L.Ed.2d 590,

Paris Adult Theater I v. Slaton, 413 US 49, 37 L.Ed.2d 446 at pg. 456; *Jenkins v. Georgia,* 418 US 153, 41 L.Ed.2d 642; however, once such testimony is proffered, it would be a denial of the Petitioner's rights to a fair trial and due process of law, preserved under the Fifth and Fourteenth Amendments to the Constitution of the United States of America, to permit the voicing of opinions by persons such as Mr. Lampshire, under color of alleged expertise, without allowing the defense the right to rebut such testimony.

4. The trial Court erred in refusing to allow Petitioner's Counsel to argue to the jury that the alleged obscene films were comparable to other sexually explicit material available in Fairfax County, Virginia, and demonstrating the limits of candor now accepted or tolerated in the County.

During final argument, Petitioner's Counsel was prohibited from arguing to the jury that they could rely upon their own knowledge of what is accepted and/or tolerated in Fairfax County, Virginia, in the vivid depiction of sex in magazines such as "Playboy" and "Hustler" as compared with the vivid depiction of sexual material in the four motion pictures presented in evidence at the trial. The question of whether such comparable materials may be considered has been argued many times and the Supreme Court of the United States in *Pinkus v. United States,* 436 US 293, 56 L.Ed.2d 293, 98 S.Ct. 1808, remanded that case to the United States Circuit Court of Appeals for reconsideration of that issue.

5. The Court below erred in denying the Petitioner's proposed instructions dealing with the definition of "prurient", and with the appeal to prurient interest of members of the intended or probable recipient group.

At the close of the trial, the Petitioner presented numerous instructions for the Court's consideration. In-

cluded therein was an instruction defining the word "prurient", (instruction D) and its application (instructions C & E, tr. 120-123). Although these instructions related to all four of the charges, they were particularly significant as to Case number 25607, in light of the nature of the film "Super Stud". Such homosexual material must be tested by its appeal to the average member of the alleged deviant group, who were the intended probable recipients, (tr. 99-105), and should not be tested against its appeal to prurient interest of the average person in the community. *Mishkin v. New York,* 383 US 502; *Klaw v. United States,* 350 Fed. 2d 155; *Paris Adult Theater I v. Slaton,* 413 US 419, 37 L.Ed.2d 466, at pg. 456, footnote 6; *Smith DBA Intrigue v. United States,* 52 L.Ed.2d 324, at note 6; *Pinkus v. United States,* 436 US 293, 56 L.Ed.2d 293, 98 S.Ct. 1808. The definition of "prurient", which refined the definition found in the Virginia Code, was significant when screened against the testimony of the Petitioner's expert witness on human sexuality, Dr. Donner, who voiced his opinion that the motion picture "Clean Sex" did not appeal to prurient interest, (tr. 97), and the motion picture "French Girls" did not appeal to prurient interest of the average normal heterosexual, (Tr. 98-99), and "Super Stud", did not appeal to prurient interest of average homosexuals, the probable, intended recipient group, (tr. 99, 104-105).

CONCLUSION

The questions presented by this Petition for a Writ of Certiorari are of great importance to the entire nation. The grey area concerning the size of a "community" for determining contemporary community standards continues to confuse trial courts as well as individuals facing incarceration for exercising their Constitutional right to free expression.

The Constitutional guarantees of a fair trial and due process of law should not be infringed by limiting relevant voir dire examination de. gned to cut into the heart of prejudice and bias. Trial Courts should treat "expert" witnesses even-handedly and defendants in obscenity prosecutions should be allowed to educate the triers of facts, regarding what material comprises the contemporary community standard, otherwise verdicts would be based upon personal taste and not upon judicially admissible evidence.

The reoccurring problem of different standards for homosexual materials demands settlement and the establishment of guidelines.

For all of these reasons, this Petition should be granted and a Writ of Certiorari should issue to the Supreme Court of Virginia.

Respectfully submitted,

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CROATAN BOOKS, INC.

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 13th *day of* November, 1978.

Croatan Books, Inc., Appellant,

against Record No. 780999
Circuit Court Nos. 25601,
25602, 25603 and 25607

Commonwealth of Virginia, Appellee.

From the Circuit Court of Fairfax County

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

A Copy,
Teste:
Allen L. Lucy, Clerk

By: /s/ Richard R. Bonials
Deputy Clerk

APPENDIX B

Constitution of the United States

[Amendment I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

[Amendment V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Amendment VI]

[Right to Speedy Trial, Witnesses, etc.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained

by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * *

[Amendment XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Virginia

§ 18.2-374. Production, publication, sale, possession, etc., of obscene items.

– It shall be unlawful for any person knowingly to:

(1) Prepare any obscene item for the purposes of sale or distribution; or

(2) Print, copy, manufacture, produce, or reproduce any obscene item for purposes of sale or distribution; or

(3) Publish, sell, rent, lend, transport in intrastate commerce, or distribute or exhibit any obscene item, or offer to do any of these things; or

(4) Have in his possession with intent to sell, rent, lend, transport, or distribute any obscene item. Possession in public or in a public place of any obscene item as defined

in this article shall be deemed prima facie evidence of a violation of this section.

For the purposes of this section, "distribute" shall mean delivery in person, by mail, messenger or by any other means by which obscene items as defined in this article may pass from one person, firm or corporation to another. (Code 1950, § 18.1-228; 1960, c. 233; 1962, c. 289; 1970, c. 204; 1975, cc. 14, 15.)
